

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
KAISER ALUMINUM WARRICK, LLC, : Docket #1:22-cv-03105-
 : JGK-KHP
Plaintiff, :
- against - :
US MAGNESIUM LLC, : New York, New York
 : February 14, 2023
Defendant. :
 : TELEPHONE CONFERENCE
----- :

PROCEEDINGS BEFORE
THE HONORABLE KATHARINE H. PARKER,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: MCDERMOTT WILL & EMERY LLP
BY: ANDREW B. KRATENSTEIN, ESQ.
MONICA SUSAN ASHER, ESQ.
TIMOTHY C. CRAMTON, ESQ.
CINDY SEELAH (PHONE), ESQ.
One Vanderbilt Avenue
New York, New York 10017-5404

For Defendant BURBIDGE MITCHELL
US Magnesium LLC: BY: CAROLYN J. LEDUC, ESQ.
215 S. State Street, Suite 920
Salt Lake City, Utah 84111

BLANK ROME LLP
BY: MARTIN SIMON KREZALEK, ESQ.
1271 Avenue of Americas
New York, New York 10020

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

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APPEARANCES - CONTINUED:

For Third Party	CADWALADER, WICKERSHAM & TAFT LLP
The Renco Group, Inc.:	BY: JOSHUA REID WEISS, ESQ.
	One World Financial Center
	New York, New York 10281

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: -- 22-civil-3105, Kaiser Aluminum
Warrick vs. US Magnesium; the Honorable Katharine H.
Parker, presiding.

Beginning with counsel for the plaintiff,
please make your appearance for the record.

MR. ANDREW B. KRATENSTEIN: Good morning, your
Honor. This is Andrew Kratenstein from McDermott Will &
Emery. With me on the line, also from my firm, are
Monica Asher, Tim Cramton and Cindy Seelah (ph).

HONORABLE KATHARINE H. PARKER (THE COURT):
All right, good afternoon, counsel; this is Judge Cott.

THE CLERK: And counsel for the defendant,
please make your appearance for the record.

MS. CAROLYN J. LEDUC: This is Carolyn LeDuc
appearing on behalf of US Magnesium. With me from my
office is Kathy Kristofferson (ph).

THE COURT: Hello.

MR. MARTIN KREZALEK: And this is --

THE CLERK: I'm sorry, we have a third party
that's dialed in, as well.

MR. KREZALEK: Yes, sorry about that. Also
appearing for US Magnesium is Martin Krezalek from Blank
Rome LLP.

THE COURT: Okay, hello.

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MR. KREZALEK: Good morning, your Honor.

THE CLERK: And we have a third party that
dialed in. Please make your appearance.

MR. JOSHUA R. WEISS: Good morning. It's Josh
Weiss appearing for The Renco Group.

THE COURT: Okay. Good morning, everybody.
And I apologize for the last-minute change. I'm
recovering from COVID. I had hoped I would be testing
negative; but, alas, I am not. So, out of an abundance
of caution, that's why I changed this to telephonic.

So before we get started, just a few
preliminaries. Because we're on the phone, I ask that
you keep your phones on mute, unless you're speaking, to
eliminate background noise, and that you state your name
before speaking for clarity of the record.

I am making a recording of this conference so
that you can order a transcript, if you would like.
Also, I remind everyone that the Court's conference line
is open to the press and public on a listen-only basis,
and that court rules prohibit others from recording and
rebroadcasting court proceedings, including this one.
Violations of this rule may result in sanctions.

Okay, there's a lot of letters that the parties
have put in, and I want to address some of the -- at

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1 least one of the easy ones first. And then I thought
2 that we'll address the discovery requests specifically
3 related to financial statements and such. That is going
4 to be relevant, as well, to the third-party subpoena
5 issue.
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7 So, first, in terms of the discovery schedule,
8 I understand the parties are in agreement that an
9 extension is needed to the discovery schedule through
10 April 5 -- well, actually, March 1st for the -- of 2024
11 -- for the filing of dispositive motions. Is that
12 right, the parties are in agreement on this proposed
13 schedule?

14 MS. LEDUC: This is Carolyn LeDuc for
15 defendants. Yes, your Honor, that's correct.

16 MR. KRATENSTEIN: This is Andrew Kratenstein
17 for the plaintiff. That is correct.

18 THE COURT: Okay, great. So I will grant that
19 schedule extension, and I'll issue a scheduling order
20 after this conference reflecting those extensions of the
21 deadline.

22 MS. LEDUC: Thank you.

23 THE COURT: So next we have the issue
24 concerning plaintiff's request to compel US Mag to
25 produce financial statements, general ledger and trial

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balance for three years preceding the events in September 2021 and to date. And I want to hear a little bit more about that.

First, I just have a couple of questions about the underlying facts, to make sure that I fully understand the issues. As I understand it, the contract was entered into in 2020 for the supply of magnesium and that at some point, US Mag's equipment, and specifically, a key turbine, broke down; and it was unable to get parts or manpower to repair the turbine and therefore could not fulfill the contract. Is that the crux of it; is a turbine the main piece of equipment that's at issue?

MS. LEDUC: Your Honor, if I may? This is Carolyn LeDuc on behalf of US Magnesium. The jury will learn that US Mag's manufacturing process is incredibly complex, mechanically, electrically, chemically, in every way; and the performance of every upstream piece of equipment has a material impact on all the downstream equipment such that if there's a problem upstream, that can quickly lead to a disaster downstream. And, unfortunately, that's what happened in this case. Despite US Mag's very best efforts, where labor and supplies were not readily available, problems upstream

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led to catastrophic damage downstream, so it became eventually a quite comprehensive failure of different parts of the plant. And that's --

THE COURT: What parts of the -- so what was the catalyst -- what failure was the catalyst the caused this, and what was the -- in just a summary fashion, what do you say happened to the equipment?

MS. LEDUC: Yeah, there's a turbine generator unit that went down --

THE COURT: Generator unit? I'm sorry, I'm having a little trouble hearing you.

MS. LEDUC: Yeah, I apologize. I'll try to speak up. There's a turbine generator unit that went down; and with that part down, with that piece of equipment down, it led to downstream equipment failures that eventually damaged the end of the process electrolytic cells. And that's ultimately what caused US Mag to cease its production entirely over last summer, in 2022.

THE COURT: I see, so there were other -- how did -- were there other specific -- is the turbine the equipment failure for which you're claiming the *force majeure*, that's the catalyst of these issues; or was there some other failing?

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MS. LEDUC: The turbine failure was an issue. There was a lightning strike at the US Mag facility causing a subsequent generator problem. The generator and turbine problems caused spray dryer problems. The spray dryer problems --

THE COURT: Wait -- wait -- hold on. Stop. The generator problem and then what did you say, stray dryer?

MS. LEDUC: Spray dryer. So US Magnesium's process --

THE COURT: Oh, spray, spray dryer?

MS. LEDUC: Yes. The process begins with evaporating and condensing magnesium chloride from the waters of the Great Salt Lake. And a vital part of that process is basically dehydrating magnesium chloride brine in spray dryers. And the spray dryer equipment was not able to withstand some problems that arose because of the turbine and generator issues. So it just created a downstream, basically dominos falling, unfortunately.

THE COURT: Okay. So what was the maintenance issue; was it the maintenance with the turbine generator, or some of this other equipment, as well?

MS. LEDUC: Well, your Honor, US Mag's position

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is there wasn't a maintenance issue. US Mag's position is that the maintenance was properly done. It remains to be seen what Kaiser alleges is the purported maintenance failure. But from US Mag's perspective, there wasn't one.

THE COURT: So why did the turbine go down?

MS. LEDUC: That's a great question. And the experts are going to be competing over what the theories of that are. But there are some turbine blades on the inside of the turbine that suffered catastrophic damage. It's the kind of damage that US Mag has never seen in the course of its history. Our engineers are going to testify and the mechanic will testify they haven't seen it before of this nature. But some blading appears to have been damaged internally. And I'm sure, like I said, the experts will have competing views on what the causes of that were.

THE COURT: I see. Okay. So it was a unique type of damage.

MS. LEDUC: Yes, yes, your Honor.

THE COURT: As I understand it, there were three turbines, and the two others also were down. Did they suffer from the same blade damage?

MS. LEDUC: No. And I think that's factually

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incorrect. There was one other turbine generator unit that was down. And the other -- and the third unit was functional at the time the first turbine generator unit went down. So units one and three were functional at that time.

THE COURT: And the other one went down because of why?

MS. LEDUC: That was the generator failure. That turbine was fine, but the 03 generator was what had issues because of electrical issues. And, again, like I said, there was a lightning surge at the facility; and, again, I'm sure the experts will be competing with opinions on what happened with the generator.

THE COURT: I see. Okay. And so the third unit that continued to function, but it couldn't -- you couldn't utilize it because of these other downstream failures?

MS. LEDUC: No. The third unit was functional until there was a generator problem. And with the generator down, the turbine was still functioning and producing hot air, but there wasn't the mobility of the air that would have been there with the turbine generator fully functional. And so between the first turbine going down and the third generator going down,

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those two things created this domino effect with downstream equipment and ultimately the electrolytic cells.

THE COURT: How long did it take for this complete failure of equipment to occur?

MS. LEDUC: Well, the initial turbine went down in -- had some problems in March of 2021. And then while US Mag was trying to do everything it could to fix those problems and address those problems, the generator on 03 went down. And when the efforts to address those problems were not successful immediately, US Mag declared *force majeure*. And so, by the fall of 2021, I believe late fall, US Mag was able to obtain the parts and supplies necessary to fix turbine number one; but at that point, the downstream issues had become a problem. So once you get into early 2022, there were problems with the spray dryer units and then eventually by the summer of 2022, that's when the electrolytic cells had gone down.

THE COURT: Okay. So are you producing any magnesium at all?

MS. LEDUC: At this time, I don't think so, your Honor.

THE COURT: And are you working to address the

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problem so you can get production back up?

MS. LEDUC: Yes. It's my understanding that that's going on on a continuing basis.

THE COURT: Okay. All right, thank you. So now let's go back to the issue of the financial statements, general ledger and trial balance for three years preceding September '21 and to date. I'd like to understand from Kaiser why this information is not only relevant but proportional to the needs of this case.

MR. KRATENSTEIN: Thank you, your Honor. This is Andrew Kratenstein from McDermott for the plaintiff. The financial documents are relevant for a couple of main reasons. First of all, as you just heard Ms. LeDuc explain, it is true that US Mag's equipment is all related to each other, and there apparently was, at least according to them, this domino effect. We contend, of course, that all of that was foreseeable because they know how their machines work and they know if, for example, generators go down, other pieces of equipment downstream can go down, as well. They also knew, because they signed this contract -- as you pointed out, the MSA was signed in October 2020. That is six months after COVID starts, and they declare *force majeure* in September 2021, about 18 months after COVID

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starts. So they do know already at the time they sign this contract, that there are supply chain and other issues that may affect the ability to get spare parts, etc., to repair things. And it's clear from the documents that they have produced that they did not have those parts; that they were, as their documents put it, robbing parts from one turbine to stick into another turbine in order to repair it.

And the question, going out of your question why are the financial documents relevant to that, well, one of the issues in this case is why were they in that position in the first place. Were they making -- they made, at least from what we've been able to piece together -- various business decisions that led to the situation that they were in, for example, building a lithium plant when they knew that they needed money to maintain and repair the magnesium plants.

THE COURT: Well, wait a minute. Just --

MR. KRATENSTEIN: The documents --

THE COURT: -- because they didn't fulfill the magnesium doesn't mean you get to go and basically sit in the shoes of the board of directors of the company and decide where it should invest its money or not. That's what you're --

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MR. KRATENSTEIN: Oh, we agree.

THE COURT: -- saying.

MR. KRATENSTEIN: No, we agree with that.

THE COURT: That's what you're saying. So I
guess --

MR. KRATENSTEIN: Well --

THE COURT: -- why wouldn't the financials just
related to the maintenance of equipment, why wouldn't
the budget -- you know, why wouldn't discovery just on
how the equipment was maintained, how it was supposed to
be maintained, what the cost for that maintenance is --
maintenance and repair and whether the budget met those
needs for that, why isn't that sufficient for your
needs?

MR. KRATENSTEIN: Well, a few reasons. We
agree, of course, we're entitled to that. But the
documents that we received so far indicate that they
were delaying or deferring maintenance projects for at
least 10 years. We do have those documents.

But then we think that the jury should also be
able to hear, because they're presumably going to say
along the lines of, "Look, we did the best we could with
the resources we had," we think the jury should be
entitled to hear, well, not really; they could have

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taken resources that they used to build a lithium plant and put it into magnesium plants. They could have taken money that they used to distribute up to its owner and us that to repair the magnesium plants. But they chose not to do that. And so we think that that's all relevant, that the jury should see the full picture of what US Mag was doing. We're not second-guessing what they did. They made business decisions; they're entitled to make those business decisions. But, you know, with all respect, that's not what we're saying. What we're saying is when you make those business decisions and then it turns out that you don't have enough money to repair or maintain your plants, then you have assumed the risk that what happened in this case, a catastrophic equipment failure, you assumed the risk that that was going to happen.

THE COURT: So why isn't it sufficient --

MR. KRATENSTEIN: And so that's what --

THE COURT: -- if you already -- if you already have information that says that they didn't fund the cost of maintenance and they delayed, why isn't that sufficient? Why is it proportional to then explore every other business decision that the company made? That's what you're seeking to do.

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MR. KRATENSTEIN: Well, in terms of proportion, we're not asking for every document they have about every business decision that they made. We're asking for --

THE COURT: Well, your document requests say "all documents." They're not --

MR. KRATENSTEIN: We would --

THE COURT: They say "all documents." So your requests are very broad. I don't think that they're narrowly tailored.

So, again, why is it proportional to explore every single other decision made by the -- financial decision made by the company?

MR. KRATENSTEIN: Well, to clarify on the proportionality issue, your Honor, what we're asking for -- and if it wasn't clear, I'll make it clear now -- in terms of the -- and the redaction issue is separate and we'll cover that separately -- but in terms of documents that we're asking them to produce that they haven't already agreed to produce, we are asking for the financial statements, which are a discrete set of documents, and the trial ledger. And so that's what we're asking for. We're not asking for every single email about every decision that they ever made and why

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they made it. So, you know, just to clarify, we're not asking for a lot of documents. We want to just see the basic, the most basic financial documents, which are your financial statements, which explain how they were spending money.

THE COURT: Okay.

MR. KRATENSTEIN: Let me just -- one other thing -- and this goes to the Renco issue, as well -- whether money was being distributed up to Renco is relevant for another reason, which gets to whether the damages limitation can be vitiated. I know you've read the initial dispute between the parties about whether the consequential damages limitation in this contract applies, and that's now before Judge Koeltl. But one of the issues that the parties are engaged on is whether, assuming that those apply -- and there's a dispute as to whether they do -- to our profit, that clause can be vitiated because of gross negligence, willful misconduct and/or bad faith. And we would submit that, if money is being distributed up to the owner of the company at a time when US Magnesium document say that in substance the company is starving for capital investments, now you at least arguably cross the line from negligence into gross negligence, etc. And we're not just fishing here;

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I mean, we have emails that say that the company thought it could be turning a corner financially in 2022, and the president of the company was asking everyone for a list of projects to work on while the money is good, and then one of the other managers says that's really good news if Ira, who's Ira Renner -- that's the chairman of Renco -- doesn't, quote, "skim off the money first."

So this isn't, you know, just some fishing expedition where we don't have any basis to believe that this may have happened. Plus, US Mag itself admitted in its letter to you in response to our letter on the financials, that at least in 2016 it did distribute money up to Renco. Well, that's at a time when --

THE COURT: Meaning so in 2016 it paid a dividend; is that what you're saying?

MR. KRATENSTEIN: Well, according to their letter, it either paid a dividend or some form of distribution. I'm not sure exactly what form that took. But, according to the letter that --

THE COURT: And why is one dividend in 2016, which is a number of years prior to the failure of the turbine, why is that relevant?

MR. KRATENSTEIN: Because the documents that we received also say that for at least a decade before

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2021, so in other words, since at least 2011, US Mag was delaying or deferring maintenance projects. So smack in the middle of that period -- and, by the way, we don't know if it's just one -- what US Mag's letter said was we have not -- in substance, distribution has not been made to Renco since 2016. So, presumably, they made some in 2016. We don't know how many were made earlier. But smack in the middle of the period, the decade where they say they're delaying and deferring maintenance and redevelopment projects at the plant, they are also making distributions up to their owner. And we think that the jury --

THE COURT: But isn't it enough that they're delaying and deferring -- isn't it enough that they're delaying and deferring maintenance, isn't that enough for you to say they can't claim *force majeure* because this is their own fault for delaying and deferring maintenance? Don't you already have enough?

MR. KRATENSTEIN: It may -- I hope so, but of course, none of us know what will happen at trial. But, again, I would say that this issue is not only relevant to negligence, which would vitiate their *force majeure* declaration because they were negligent; it also goes to whether any damages limitations can apply, because now I

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think -- again, when you're crossing from not spending enough money on plants and equipment -- perhaps because you don't have it for some reason, whatever the reason is -- but then the reason, or at least a reason, is, well, we don't have the money to repair the equipment because we're making distributions to our owner, now I think you're, at least again arguably, crossing the line from negligence to gross negligence and perhaps beyond. And that goes to the enforceability, not just whether the *force majeure* is enforceable and valid, but whether the damages limits that they seek to apply to us even if the *force majeure* is valid, whether those damages limits can be applied here.

THE COURT: Well, on what basis are you asserting that defendant delayed or deferred maintenance because it decided instead to pay a dividend?

MR. KRATENSTEIN: Well, we don't know because we haven't gotten the documents if they delayed or deferred maintenance.

THE COURT: What explanation have you received as to why there was a deferral of maintenance?

MR. KRATENSTEIN: Well, I'll read to you -- I have a memo; the best I can tell you is a memo that we have. It's a memo from November 2021, which is a couple

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of months after -- a little bit less than actually two months after the *force majeure* -- about a month after the *force majeure* was declared. It says in substance that, "US Mag's been impacted by several significant business issues over the last 10 years." And it goes on to say that, "These issues have required the company to remain very frugal regarding capital investment and modernizations," and that, "a number of projects have been deferred or delayed during this economic climate." And then it goes on to list various project, by the way, including a project to upgrade the gas turbines that you've heard about.

Then we have the email that I told you about where we have at least one high-ranking US Mag official later in time saying when US Mag is thinking things might turn around, that would be great but, you know, hopefully the owner won't take the money that we need to fix the plant.

Now, we haven't taken depositions yet. I intend to, of course, asking about these documents. But we think we're entitled to get the documents so that we can ask the US Mag witnesses the question.

THE COURT: Okay. I'll hear next from US Mag.

MS. LEDUC: Thank you, your Honor. There are

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several points that I'd like to respond to. First and foremost, US Mag has never asserted as a defense a lack of financial resources. And the case cited by Kaiser on that issue, on the so-called relevance of financial resources actually says just exactly the contrary. Financial resources of a defendant has nothing to do with the efficacy of a *force majeure* defense. It has nothing to do with it. In fact, the case cited by Kaiser, the plaintiffs were seeking summary judgment on the basis that that was the defendant's defense, lack of money. And the Court said, look, I agree. Lack of money is not a defense. Lack of money is foreseeable; it's not a defense. But, plaintiff, I'm not granting you summary judgment, not because there are questions of fact and financial ability, but because the plaintiff hadn't met its burden of proof to show that performance under the agreement was even physically possible at the time. That was the basis on which summary judgment was denied.

So the cases -- and I assume -- I'm sure that Mr. Kratenstein and his team are very competent on Westlaw and Google and Lexis and every research database. They haven't come forward with a single case anywhere in American jurisprudence to support the

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relevance of a defendant's financial condition with respect to *force majeure*. It's not out there. And what is out there -- and we could cite legions of these cases -- is that financial information is not discoverable. It's not just irrelevant; it's not discoverable. And the reason for that, your Honor, is that when we get to trial, it's not only not relevant; it stays out under Rule 403. And not only does it stay out under Rule 403, but courts will often also give jury instructions that instructs the jury explicitly you are not to take into account the wealth or poverty of any party in this action, because it is not relevant. The Courts are extremely protective of financial information; and discovery, prejudgment discovery of a defendant's assets, is completely improper. And that is what's going on here. Make no mistake; that's what's going on here.

The allegation that money was distributed to the parent company, totally unfounded. In fact, in written discovery, US Mag asked Kaiser, you've got this line in your Complaint that says US Mag's an instrumentality of Renco. Provide every document you relied on for making that claim. And Kaiser's response was that issue is not relevant to this case and not

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likely to lead to discovery of any relevant evidence.
We could not agree more. US Mag's financial situation,
its relationship with Renco, totally unrelated to the
issues in this case. So your Honor asks isn't it enough
whether the equipment was maintained or not; yes, it is.
In fact, that's the only relevant issue in US Mag's
force majeure defense, was the equipment reasonably
maintained, were the equipment failures reasonably
beyond or beyond US Mag's reasonable control -- I think
that's what the language of the contract is. But that's
the issue in the case. So financial information, oh, we
just want to dip our feet into the water of US Mag's
financials, we just want to probe and see whether Ira
Renner took some money away from US Mag. No. It's a
fishing expedition. They're trying to bring Renco into
this suit. Because if they can bring in Renco, maybe
they have some collectability for judgment. That's
what's going on in the mind of Kaiser, and it's
completely improper as a basis for discovery. I'm sure
Mr. Weiss would appreciate addressing that issue, also.

THE COURT: Well, did US Mag pay dividends to
Renco?

MS. LEDUC: No. In fact, we said in the
pleadings since 2016 there hasn't been any dividend.

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And, again, I'll defer to Mr. Weiss on that issue because he's more familiar with that than I am. But the allegation that Renco is skimming money off the top of US Mag is completely factually unfounded; there is no factual evidence in support of that at all.

THE COURT: And is US Mag, it's -- is an LLC -- is it taxed as a disregarded entity such that it's a division of Renco?

MS. LEDUC: Maybe Mr. Weiss can answer that.

MR. WEISS: Your Honor, this is Josh Weiss. Yes, US Mag is a disregarded entity for tax purposes. But it is obviously its own separate corporation with its separate manager. Ron Thayer, who is the president of US Magnesium, is also the manager of US Magnesium LLC.

THE COURT: Well, doesn't that make some difference? If it's a disregarded entity, doesn't that allow some greater flexibility as to decision-making at US Mag in terms of influence of Renco?

MR. WEISS: Your Honor, with all due respect, absolutely, positively not. That is -- a disregarded entity is solely a tax fiction which allows entities within a structure to be taxed as a single entity. It has no bearing whatsoever in any jurisprudence anywhere

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in this country on the basic fundamental principle of corporate separateness. And corporate separateness is to be respected unless there are allegations. And whether it's Delaware or New York law, that there is some extreme element of control over the operations of the entity and that the entity is being used for some form of fraud or injustice.

THE COURT: Okay, I'm going to go back to US Mag. Are there other points you want to make on proportionality?

MS. LEDUC: Well, and let me just address one issue really quickly before proportionality -- well, I guess I'll go straight to the proportionality issue. No, it's not proportionate. And mostly for the reason is not relevant. I mean, as your Honor asked, wouldn't it be enough for them to get information about what money was spent on maintenance. If you think that, you know, X maintenance should have been done and wasn't done, fine. But decisions made about where money was spent instead of that, whether it's employee benefits or doughnuts for the breakroom, not within the realm of anything that Kaiser can come in and ask the jury to second-guess.

But the other point that I wanted to make,

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Kaiser's counsel said that alleged bad acts on the part of Renco -- mind you, not even on the part of the defendant but on the part of Renco's shareholder -- can somehow be used to eviscerate a consequential damages waiver in a contract, that is completely erroneous just as a matter of law. This is UCC case. The enforceability of a consequential damages waiver is a matter of statute. It's not a matter of common law; it's a statute. And the statute is very plain: consequential damages can be waived unless -- one basis -- unless there's a showing of unconscionability, which as your Honor is probably aware, is an extremely high burden. In this case Kaiser hasn't alleged unconscionability, it hasn't argued unconscionability. It's not at issue in the case at all, and it's certainly not the same standard as bad faith or so-called gross negligence.

And, by the way, the cases that Kaiser has cited on gross negligence, number one, not UCC cases; but the one case they added to their briefing, just in the most recent round, they purported to say, oh, you know, consequential damages waiver does constitute the kind of waiver that gross negligence can overcome. If you read that case, it was a tort case; it wasn't a UCC

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2 case. It was a contract case for services, and there
3 were separate tort claims being litigated. So it's
4 totally distinguishable from this case. It wasn't
5 governed by statute as this case is.

6 So that whole idea that you can somehow pin
7 wrong conduct on US Mag, let alone Renco, let alone
8 Renco's shareholders to somehow eviscerate a contractual
9 agreement that consequential damages would be waived is
10 just not supported under the law.

11 THE COURT: Okay. And Kaiser is not disputing
12 that the UCC applies, is it?

13 MS. LEDUC: I don't believe so.

14 THE COURT: Okay. In my view, the financial
15 statements, general ledger and trial balance are not
16 relevant to this case. And, certainly, even if they
17 were marginally relevant, they're not proportional to
18 the needs of the case. So I am going to deny the
19 request. And I'll issue an order on this after this
20 conference.

21 Now let's talk about the motion to compel
22 because some of the items that plaintiff is seeking to
23 compel production of from Renco relate to these
24 financials, so my ruling also will apply to that motion
25 to compel. But I think that there is some separate

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information. It sounds like there's, from the letters that were written, it sounds as if US Mag would send monthly memos, management presentations to Renco about its operations and so forth. And I imagine that there would be some number of presentations and potentially minutes from meetings at Renco that discuss the particular equipment failures and the decision to declare a *force majeure* that may not be completely within the hands of US Mag. So I'd like to hear from, first from Renco about what unique documents it might have on these issues.

MR. WEISS: Thank you, your Honor. Josh Weiss from The Renco Group. Your Honor, it is highly unlikely that Renco has unique documents on this issue. And the reason is very simple. Renco is an investment holding company. We own businesses; we do not operate those businesses. We do not have the technical expertise to run a magnesium plant. We have no ability to say what repairs should be done when, what needs to be fixed, how it needs to be fixed. It's not within our area of competence. And our model is that we rely on our management teams to make those decisions. And that's why Ron Thayer is the manager of US Magnesium LLC, and he is essentially the chairman of the board, and he

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makes those decisions. And for that reason, the information that Renco has about operations at US Magnesium is information that is provided to us by US Magnesium, as you pointed out, in the form of monthly management presentations. And I will tell you, for example, we did not even know that US Mag was declaring *force majeure* until after it happened.

So is it possible that there are unique documents? Certainly, it's possible. If there are, it is likely a very small quantity, and it will require some needle-in-the-haystack type of looking, and that is why in my correspondence with Mr. Kratenstein I repeatedly pointed out that overwhelmingly the information that he is seeking from Renco is the same information that is in the hands of US Magnesium; and to require us to search for this needle in the haystack, which really cumulatively does not, even if it were there, it's hard to imagine how it adds to the claim they are bringing or the theory of the claim that they are bringing, and as such, it is unduly burdensome on Renco.

THE COURT: Why do you say it's needle in the haystack if it's just -- wouldn't it just be these memos and minutes where you were discussing when the learning

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of the declaration of the *force majeure*? I mean, you stated you only learned after the fact. There must be some document you're relying on to make that statement.

MR. WEISS: Well, with all due respect, your Honor, I don't have -- I know for a fact that we don't have memos that were generated here at Renco about those issues. We don't have minutes of meetings that are held with US Magnesium. US Magnesium, as we discussed, prepares a presentation for a monthly management review that is presented to us generally in person. And there are discussions that take place on all topics. I imagine that -- and, again, those are presentations prepared by US Mag and provided to us. So perhaps needle in a haystack wasn't the greatest analogy, but these are not documents -- the documents you describe and that Mr. Kratenstein theorizes exist do not in large measure. Again, it's not to say that there isn't one here or there or some here or there, but that's, in my understanding and based on the interviews that I've conducted of the business folks who interact with the US Mag folks, that is not our practice.

THE COURT: So let me hear from Kaiser. Did you get these business presentations? Did US Mag already provide to you the information that it sent up

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to Renco about these issues?

MR. KRATENSTEIN: Well, I can only tell you what I know, your Honor. What I know is that until yesterday we received a grand total of, you know, five email chains between US Mag and Renco -- yesterday, literally. I guess, actually technically, it was the day before yesterday -- I apologize -- the day before yesterday, we received a production of monthly reports, heavily redacted monthly reports -- and I know we'll get to that -- that are reports that were sent from US Mag to Renco. I don't know if that's a universe, I don't know if that's a universe of documents that were sent between US Mag and Renco.

But our position on this is a couple of things. Number one -- and we do find it somewhat inconceivable that, given that US Mag asserts that Renco has invested hundreds of millions in US Mag -- and, obviously, as you just heard, it owns US Mag, it's a disregarded entity for tax purposes -- that there aren't nonduplicative documents within Renco, internal communications, talking about this catastrophic, what everybody agrees is a catastrophic event at US Mag that you heard at the top of this call has led to the complete cessation of magnesium production for months, you know, that there

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are no emails about this internally, there are no emails -- I mean, it's just -- you know you can imagine we were kind of surprised to hear that.

And I'm also surprised to hear -- and you heard just now Mr. Weiss say, well, it's highly unlikely we have nonduplicative documents. Well, have you looked? Because we agreed in December that they were going to run search terms over their documents, the typical thing we all do in litigation, particularly by the way, they're not just some nonparty; they own the defendant. So they agreed to run search terms, and the only reason I brought this to your Honor is because, candidly, we believed they were giving us the runaround because they haven't produced any documents and we're now in the middle of February.

So, you know, we think we're entitled to the documents. And, by the way, that's even -- even if they are, quote, "duplicative." As I'm sure your Honor knows, duplicative documents, communications between two parties or two nonparties or a nonparty and a party, get produced all the time. And there's case law -- the case law's actually cited -- we cited it for Mr. Weiss in the letters that I sent to him that are attached to his letter to the Court saying just because an email or

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something may be duplicative doesn't mean you don't have to produce it. That gets produced all the time.

And in this case, that's important for a couple of reasons. Number one, presumably, US Mag is sharing with Renco what US Mag considers important information. So the fact that Renco has it is itself relevant. And, second, we have had significant issues with US Mag's production. I won't bore you with all the details. But one of the issues has been, for example, they have not produced back to us all of the communications between US Mag and Kaiser that we have produced. And so the best way to make sure that you're getting both sides of a conversation is to get both sides of the conversation. And that's all we're asking, and we don't think it's unduly burdensome. We don't think -- you know, we had been told, well, there's hardly anything. Well, if there's hardly anything, run the search terms and produce the documents.

THE COURT: Okay, so in terms of the subpoena, I think there are things that the parent company may have that are unique that bear on information about the maintenance and upkeep or deferral of maintenance and repair of the equipment that failed, as well as the actual failure and the declaration to declare *force*

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majeure with respect to this and the cessation of the magnesium as a result of these catastrophic failures. So what I'm going to direct the parties to do is to meet and confer to narrow the requests and objections. And what I'm going to ask you to do is to write me a letter in two weeks and let me know how you've narrowed down the dispute, and then I will address those issues. But I think you can do a little bit more work, and I think that there are some things that Renco has and can produce that would be relevant. So I want you to meet and confer over the next two weeks and then send me a joint letter with what are the narrowed-down disputes.

MR. WEISS: Understood, your Honor. Thank you.

THE COURT: Now, in terms of the redactions, let me understand that nature of the redactions, first from Kaiser's perspective. You said you received copies of these monthly management reports. Do the unredacted portions concern investment in and repair and maintenance of these various machinery, manpower needed to fix it and those related issues?

MR. KRATENSTEIN: If I understand your Honor's question, I think the answer is yes and no. So there is certainly some unredacted information about that. But there also appears to be redacted information about

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that, too. Just to give one example -- and, again, the redactions are heavy, so it's hard to tell exactly what's been redacted. But it appears, for example, that they redacted whether their capital spending was up or down, you know, in a particular month and by how much. Well, that's obviously relevant; capital spending goes to maintenance and repairs.

The other items that are redacted -- it's very hard for me to tell -- there are just headings about the general topics, but then, you know, giant blocks of redactions all over the document. So, as you know, we contend they shouldn't be redacting anything under the case law, but even what they have redacted appears to be relevant.

THE COURT: So, normally if there's a protective order in place, redactions are not going to be appropriate unless there's something, you know, particularly sensitive. And I'd like to understand US Mag's position here, because you do have an option, too, of marking some things Attorney's Eyes Only, as opposed to just redacting. So there's multiple protections you can have under a protective order that wouldn't involve redacting.

MS. LEDUC: This is Carolyn LeDuc. Thank you,

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your Honor. Let me just address that question. So there's three kinds of information that's been redacted in general. It's financial information, so it's income, loss, balance sheets, those kinds of things; environmental information; and information about parts of US Mag's operations that are unrelated to the production of magnesium. So those three categories of information. But what you'll discover, your Honor, is that Kaiser's arguments for so-called relevance for all of these issues go back to the issue of US Mag's decisions about its money. So environmental information, they want to know that because the theory is well, maybe US Mag was spending money on remediation or maybe US Mag had to settle some environmental lawsuit, and we should be able to tell the jury that US Mag spent money on the environmental issues rather than equipment maintenance. No, that's not a basis for relevance. And then information about parts of US Mag's operations unrelated to magnesium, well, as you heard, US Mag's producing lithium, and jeez, we should be able to see everything that US Mag did on the lithium side of the facility so that we can show that US Mag shouldn't have been spending money on lithium; it should have been spending it on magnesium. That gets back into all the

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issues we were just addressing on financial information.

So if US Mag's monthly management reports are sending Renco, as they were, financial information that we just talked about the irrelevance of, the prejudicial nature of the -- it doesn't come in, it's prejudicial, it's going to be abused and misused in this case to create this case into something it is not about and should not be about and cannot be about as a matter of law. The question is is Kaiser just going to get that information, anyway. Our position has been it should be redacted. You know, it sounds crazy, your Honor, but there could not be any hotter -- well, this part of it doesn't sound crazy -- there could not be any hotter, more controversial issue right now than environmental issues. And Kaiser, I think, is really hoping it can fish through the environmental information and find some way to turn this case into a referendum on US Mag's environmental record. Frankly, your Honor, Kaiser is an aluminum facility, US Mag is a magnesium facility. These companies deal with environmental issues. That is an issue that could be extremely hot button for the jury. Crazy as it sounds, we've seen other parties try to do the same thing in other cases. It's frankly astonishing how far these parties will go to try to get

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environmental issues before a Court because they're so prejudicial in the minds of modern juries.

And so it's really beyond dispute environmental issues are not relevant to the case. Kaiser hasn't propounded a single document request addressing environmental issues or the lithium production, none of that. So why are we going to then hand Kaiser all of the information that we just disputed the relevance of in management reports when it's just -- it's not relevant? And so what you see in the cases that address the redactions is Courts will just go through and say, all right, this is not relevant, it can stay redacted; and this part, I find it relevant, it can come in.

So we've got monthly management reports that were delivered to Renco, we've got engineering reports that deal with partly magnesium but partly lithium. They don't need the lithium information. They're not going to turn the information about lithium into some basis again for second-guessing US Mag's financial decisions and (indiscernible) the only conceivable basis on which anything about lithium or the environment could even be stretched into this case. And it shouldn't be as a matter of law. It's prejudicial as well as irrelevant.

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So it's not just a question of, you know, can we keep it to Attorney's Eyes Only; it's frankly the attorneys who are going to try to abuse this information. So that's US Mag's position. The information's just not relevant. And handing it to Kaiser in these monthly management reports is just inviting them to do all of the things that Courts rankle at over the financial issues, because it's all -- it all boils down to how US Mag spent its money, all of these issues.

THE COURT: Have you produced just the maintenance budget?

MS. LEDUC: Um --

THE COURT: Is that segregated, or just the spending on maintenance and repair?

MS. LEDUC: Yeah, I don't -- that's not the kind of thing we would have redacted. Information that was put into capital expenditures for magnesium, I think that information was produced unredacted. And if it deals with magnesium, fine, it comes in. But when counsel for Kaiser talks about capital spending being an issue that's clearly relevant, it's not. What US Mag spent on its capital expenditures for parts of the plant having nothing to do with magnesium is not relevant.

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THE COURT: How many of these reports are there that are redacted?

MS. LEDUC: I think there are a few hundred -- they're monthly management reports, so they're delivered once a month. And I believe there were several years of reports that Kaiser requested. So it's going to be -- it's going to be a few hundred pages of documents.

THE COURT: I'd like to see a sample of the unredacted with the redacted portions highlighted. Can you submit three sample reports to me?

MS. LEDUC: Yes.

THE COURT: And what I'm going to ask is I'm going to ask Kaiser to identify the three to be submitted to me *in camera*. So Kaiser has the redacted ones. So, Kaiser, by tomorrow identify the three reports that you want submitted to me *in camera*. And then by Friday I want US Mag to email me for *in camera* review the unredacted ones identified by Kaiser. And obviously, that will be *ex parte, in camera*. And I will take a look at what the redactions are.

MS. LEDUC: Okay. And just to clarify, your Honor, there are additional documents that have been redacted, but they've been redacted for the same reasons. The monthly management reports I think should

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be fairly simple to analyze because they follow the same pattern. If you've seen one, you've seen the template for all of them. They're basically the same information but, you know, updated each month.

The other main packet of information or type of documents that are at issue on the redaction is engineering reports. They likewise follow consistent patterns such that if you've seen one, you kind of know what all of them look like. They contain some information relevant to US Mag's magnesium production, but some information relevant to lithium production, which we would maintain is not relevant.

THE COURT: Well, Kaiser can designate either a management report or an engineering report.

MS. LEDUC: Okay.

THE COURT: So three of them, and I'll take a look. But since Kaiser's objecting, it can identify the reports it wants me to take a look at. And --

MS. LEDUC: Okay.

MR. KREZALEK: Your Honor --

THE COURT: Go ahead.

MR. KRATENSTEIN: Sorry, your Honor. No, sorry, your Honor. (indiscernible). I just wanted to -- may I respond briefly? I appreciate your order and

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will, of course, comply, but --

THE COURT: Sure.

MR. KRATENSTEIN: Oh, thank you. What you just heard from Ms. LeDuc sounded like an argument on a motion in limine. You know, if they want to argue before the trial that there are certain things that are off limits before the jury, you know, they'll have every opportunity to do that.

THE COURT: Oh, sure. I -- the evidentiary rules are not pertinent to what is discoverable. Relevance is broad under Rule 26. So I understand that point.

MR. KRATENSTEIN: Great. And, you know, and I know you also know the rules. I mean, there's really no compet -- we're not competitors. This isn't personal information. As you know, it's highly unusual to redact documents, particularly this extensively.

And, by the way, just last thing and then I'll stop. You know, we've produced a lot of documents in this case, Kaiser has. We've produced, you know, actually multiples more than US Mag has. We haven't redacted a single document for relevancy. And there is tons of information in these documents that has nothing to do with this case, because we know it's improper to

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do that. And so, you know, again, we think that the law is very clear on this -- we know you're familiar with it -- that there are really very limited circumstances when they can redact this type of information. And it's improper. So, anyway, that's all I wanted to say on that topic.

THE COURT: Okay. Thank you. I think I understand the parties' arguments, and I'll just take a look at these redactions.

Then, finally, there's the issue of the motion to stay discovery on consequential damages. What I'm going to do is I'm going to schedule another conference within the next 30 days. I am not inclined to stay discovery on consequential damages to the extent that doing so would require witnesses to be redeposed unless you're saying that the witnesses would have more than one day of deposition anyway and that the information is clearly discrete. So I want to -- what I'd like to do is to understand a little bit better what the overlap is because I don't want to have inefficiencies in discovery. And if redepositions can be avoided, there may be certain discovery that not -- that can be delayed rather than stayed pending a ruling on the motion to dismiss. So I want to understand what really is

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overlapping and what really would be discrete on the consequential damages issue. And I'm not sure that's completely fleshed out in the letters that I read that you submitted. So I want you to meet and confer about what is overlapping and what is discrete and what could be reasonably delayed given the extension in the discovery schedule anyway and what really is more efficient just to deal with now even if at the end of the day the motion to dismiss is granted. Okay?

MS. LEDUC: And, your Honor, this is Carolyn LeDuc, would you like us to then submit a letter? What would you like us to do in terms of --

THE COURT: Yes. I want you to meet and confer on that. And then I'll look at the calendar and schedule another conference. And you should submit a joint letter on this issue a week prior to that conference. And if you have competing proposals, you can just put it in two separate sections. It doesn't -- I'll give you each a chance to, each side a chance to talk at the conference. Okay? It's not meant to be a full briefing.

MS. LEDUC: Thank you.

THE CLERK: Judge?

THE COURT: Yes?

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THE CLERK: I just want to remind you you also have a conference scheduled already for March 29th at 11 a.m.

THE COURT: Oh, fantastic. Okay. Good. So everybody has that on their calendar?

THE CLERK: That's an in-person conference.

THE COURT: Okay. Okay, good. So -- hold on here; let me just look at the schedule.

THE CLERK: We can extend that for more time that day, as well.

(Clerk and Court discuss scheduling time.)

THE COURT: Because what I want to really understand is what are the depositions happening. I want you all to talk about the schedule for depositions, get some deposition dates out on the calendar. And each side should think through what are the topics that those witnesses will be dealing with. And be prepared to discuss all of that at the March conference. Okay?

MS. LEDUC: Will do. Thank you, your Honor.

THE COURT: So we'll just --

MR. KRATENSTEIN: Thank you, your Honor.

THE COURT: Just submit the joint letter on that a week in advance of that conference.

Okay. I have another conference, so we have to

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adjourn. And I'll look forward to your letters. Thank
you.

(Whereupon, the matter is recessed.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Kaiser Aluminum Warrick, LLC v. US Magnesium LLC, Docket #22-cv-03105-JGK-KHP, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: February 16, 2023